

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DIALLO R. MADISON,

Plaintiff

-v-

9:06-CV-1488 (NAM/DEP)

F. NESMITH, DR. SILVERBERG, and
GEORGE S. DUNCAN,

Defendants.

APPEARANCES:

DIALLO R. MADISON
94-A-7376
Mid-State Correctional Facility
P.O. Box 2500
Marcy, New York 13403
Plaintiff, *Pro Se*

HON. ANDREW M. CUOMO, Attorney General of the State of New York
CHRISTOPHER W. HALL, ESQ., Assistant Attorney General
Department of Law
The Capitol
Albany, New York 12224
Attorneys for Defendants

Hon. Norman A. Mordue, Chief U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

Plaintiff, an inmate in the custody of the New York State Department of Correctional Services, brought this *pro se* action stemming from medical treatment to his right elbow between January and May 2003, including surgical removal of a benign nodule on the elbow by defendant F. Nesmith. Plaintiff asserts civil rights claims under 42 U.S.C. § 1983, alleging that defendants acted and conspired to act with deliberate indifference to his serious medical needs in violation of the Eighth Amendment prohibition against cruel and unusual punishment. Plaintiff also asserts assault and battery causes of action under New York State common law.

Defendants move for summary judgment (Dkt. No. 98) on various grounds. Upon referral pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c), United States Magistrate Judge David E. Peebles issued a Report and Recommendation (Dkt. No. 109) recommending summary judgment dismissing the Eighth Amendment and conspiracy claims on the merits. He further recommends that this Court decline to exercise jurisdiction over the state law claims and dismiss them without prejudice.

Plaintiff has submitted an objection (Dkt. No. 110) to the Report and Recommendation. In view of plaintiff's objections, pursuant to 28 U.S.C. § 636(b)(1)(C), this Court conducts *de novo* review. Upon thorough review of the record, the Court adopts the Report and Recommendation in all respects.¹

It is therefore

ORDERED that the Report and Recommendation of United States Magistrate Judge David E. Peebles (Dkt. No. 109) is accepted and adopted; and it is further

ORDERED that defendants' motion for summary judgment (Dkt. No. 98) is granted, the Eighth Amendment deliberate medical indifference and conspiracy claims are dismissed on the merits, and the state law tort claims of assault and battery are dismissed without prejudice.

IT IS SO ORDERED.

March 11, 2009


Norman A. Mordue
Chief United States District Court Judge

¹ In declining to exercise jurisdiction over the state law claims, the Court agrees with Magistrate Judge Peebles that the state law claims cannot be disposed of on summary judgment at this point. Rather, they likely require a trial and cannot be easily resolved by this Court, nor can it be said that they are plainly without merit. Further, dismissal of the federal claims has no preclusive effect on the state law claims. Thus, federal-state comity and efficiency concerns do not militate in favor of retention of jurisdiction. *See Advisory Group Report on Ancillary State Claims*, adopted by New York Federal-State Judicial Council, January 21, 2009.